

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BORDERS, INC.

and

Case No. 34-CA-7800

LOCAL 371, UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION, AFL-CIO

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for the General Counsel

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for the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut on February 5 and 6, 1998. The original charge was filed by Local 371, United Food & Commercial Workers International Union, AFL-CIO (hereinafter Union) on March 18, 1997 and an amended charge was filed on April 9, 1997. A second amended charge was filed on April 28, 1997 and a third amended charge was filed on May 28, 1997.¹ The complaint was issued on June 19, 1997 and generally alleges that Borders, Inc. (hereinafter Borders or Respondent) engaged in conduct in violation of Section 8(a)(1), (3) and (4) of the National Labor Relations Act (hereinafter Act). Respondent filed timely answer in which it admitted certain allegations, including the jurisdictional allegations, but denied the commission of any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with its principal place of business in Ann Arbor, Michigan engages in the retail sale of books, magazines, music and videos. As pertinent to this proceeding, it maintains a retail book store in Stamford, Connecticut. As noted, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section

¹ All dates are in 1997 unless otherwise indicated.

2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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A. Background and Issues for Determination

10 Borders, Inc. engages in the retail sale of books, magazines, music and videos in about 205 stores as of this time. It is a fast growing company having added approximately 40 to 45 stores a year for the last three years. Respondent conducts its business on a nationwide basis, with some presence overseas. Its United States operations are mostly union free. It has four stores where the employees are represented by a union. These are the World Trade Center Store in Manhattan, the Bryn Mawr, Pennsylvania store, the Lincoln Park Store in Chicago, and
15 the Des Moines, Iowa store. The company has entered into collective bargaining agreements with the union at the Chicago and Des Moines stores and is in negotiations for an agreement at the other two locations.

20 Organizing efforts have resulted in union representation elections at stores in Seattle, Washington, Evanston, Illinois; Philadelphia, Pennsylvania; and Stamford, Connecticut. In these locations, the employees elected not to have union representation. From these campaigns, other than Stamford, two unfair labor practices charges were filed with respect to the Philadelphia store and these charges were dismissed. One unfair labor practice charge was filed with respect to an organizing effort at the Chestnut Hill, Pennsylvania store. This charge
25 was settled. Other than at Stamford, no objections were filed to the elections and no re-run elections have been held.

30 Borders' Stamford store has been open for five or six years. It originally opened as Bassett Bookstore, but after certain corporate changes, it became a Borders' store. Borders' store chain of command in the field consists of four territorial vice-presidents, who each have reporting to them two regional directors. Each store has a general manager who reports to the regional director over his or her geographic region. The general manager is responsible for the day to day management of the store which he or she manages. Within the stores, reporting to
35 the general manager are a varying number of assistant managers. All the above described positions are supervisory positions within the meaning of the Act. The non supervisory employees in the stores are lead clerks, book sellers; music sellers if the store sells music; and cafe workers, if the store has a cafe. Staffing of stores is decided by volume and complexity of the individual stores. Borders' corporate retail management sets the payroll budget limit for the stores, and then it is the stores' general managers' responsibility to staff the stores within the
40 budget constraints. The Stamford store, in addition to selling books, has a small cafe. The entire store has about 10,000 square feet and employs about 40 people. The book sellers are all assigned a section of the store, such as history, children's, science fiction, etc. Each employee generally has some other work responsibilities as well.

45 In the Fall of 1996, the Stamford store had as its General Manager Carol Wiener and its involved Assistant Managers were Todd Vasileff, Katie Allen and Chuck Aloisa. Christine Farrugia was a book seller in the store and is the alleged discriminatee in this proceeding. Farrugia sought out the Union to organize the employees of the Stamford store and an organizing campaign got underway in December 1996. Respondent campaigned against the Union, primarily in meetings with employees. About the first of January, 1997, the store's General Manager Carol Wiener was replaced by Catherine Landau. The campaign resulted in a Board election held January 28, 1997. The Union lost the election and filed objections to the

elections. Hearing were held on these objections on February 28, 1997 and March 13, 1997. Farrugia offered testimony on behalf of the Union at the February 28th objections hearing. Subsequently the objections were overruled. The Complaint alleges that during and subsequent to the organizing campaign, Respondent committed certain unfair labor practices. Specifically, the Complaint alleges that Respondent violated Section 8(a)(1), (3) and (4) of the Act by:

1. About December 15, 1996, by Assistant Manager Katie Allen, interrogating employees about their union activities and creating the impression among employees that their union activities were under surveillance.²

2. About March 1, 1997, by Assistant Manager Aloisa, issuing to employee Christine Farrugia a lower rated performance evaluation.

3. About March 1, 1997, denying contingency status to its employee Christine Farrugia.

B. The Facts Surrounding the Campaign and the Alleged Unfair Labor Practices.

1. The Union Campaign is Instituted

All of the Complaint allegations revolve around Respondent's alleged response to the protected activities of its employee Christine Farrugia. She was employed by Borders from September 1995 until she voluntarily quit to take other employment and return to school on March 1, 1997. Her primary job while employed at Borders was that of book seller. In this position she had the responsibility of helping customers, working at the customer information desk, shelving books and working at the cash registers. In September 1996, she was given the additional positions of lead clerk, backup trainer, and sidelines coordinator. In October or November, 1996, she received the additional duties of merchandising clerk. According to Farrugia, her lead clerk duties made her responsible for making sure that all sections of the store were covered and scheduling employees to make sure the cash registers were covered in case a regularly scheduled employee was absent. The position also involved certain cash functions such as making change from the store safe and pulling money from the cash registers.

Farrugia testified that her duties as back up trainer involved training new employees when the regular trainer was unavailable and to train part-time employees at night. Her duties as sideline coordinator was to order all cards sold and sideline items. She also maintained inventories on these items in the store and placed them in the store. As merchandising clerk, she was to make the special displays in the store for holidays and for certain promotions the store conducted with publishers.³

In or about December 1996, Farrugia heard that other Borders stores were involved in

² The Complaint also alleged that Allen violated the Act by threatening employees with discharge for engaging in union activities, and further that General Manager Catherine Landau orally promulgated a rule restricting employees from discussing the terms and conditions of employment with other employees. These two allegations were withdrawn at the outset of the hearing held herein.

³ Farrugia was given these duties and titles by then General Manager Carol Wiener. As will be discussed in detail, Wiener was replaced in her job by Catherine Landau, who though acknowledging that there are responsibilities that correspond to the job duties outlined by Farrugia, she does not acknowledge that there are titles given to these jobs.

seeking union representation and she spoke about this with other Stamford employees. Some seemed interested so she contacted the Union and talked with its Secretary/Treasurer Brian Petronella. She told him that she was interested in organizing the Stamford store and he related he had heard of other organizing efforts at Borders' stores. He informed her that it would be necessary to get signed authorization cards to initiate the campaign. They set up an initial union meeting at Farrugia's house for the following week. The meeting took place with Petronella, Farrugia, and her fellow employees John McNally and Samarpana Tam in attendance. Petronella told them about the Union, explained the organizing process, gave them Union literature and had them sign authorization cards. He gave the three employees other authorization cards to be signed by other interested employees.

Farrugia thereafter began to actively solicit support for the Union from fellow employees. She spoke to some by telephone and solicited others at work during breaks, in the parking lot and at a diner across the street from the store. During one instance when she was soliciting in the stores' break room, she was observed by Assistant Manager Allen.⁴ In December, prior to the filing of a petition for representation, while working, Farrugia was approached in the basement of the store by Assistant Manager Allen. According to Farrugia, Allen instituted a conversation by asking Farrugia what was going on. Farrugia replied that she did not know what Allen meant. Allen stated that she had talked to another employee, Vivian Torres, who had told her that there was something about a union going on. Farrugia told Allen that the employees were in the process of signing authorization cards and needed just a few more signatures before filing a petition for representation. Allen asked why Farrugia had not told her about this effort. Farrugia replied that she had been informed by the Union that many times a manager's job would be placed in jeopardy if they knew about an organizing campaign and did not say anything. She added that for this reason the Union had advised that they not say anything about the organizing effort to anyone in management. Allen then said it would be fine, go ahead and do it, adding that Farrugia should keep her informed about what was going on.

Allen agreed that this conversation took place. She remembers being asked by Vivian Torres "What's up with this union thing.?" She went to Farrugia and asked her what was going on with the union. She remembers Farrugia saying the employees were trying to get signatures for a petition. She testified that she asked Farrugia about the union because she was "nosy" and just wanted to know what it was about. She asked Farrugia because Torres identified Farrugia as the person going around getting signatures. She denied having any other conversations with Farrugia about the Union and there is no evidence that she did. Allen testified that after the petition for representation was filed, the Company instructed them on what they could and could not do in an organizing context, including prohibiting interrogating employees about the Union or how they would vote.

Farrugia testified that she and Allen had worked for period of time together as booksellers before Allen was promoted to Assistant Manager. She considered her relationship with Allen friendly and they occasionally socialized together when a group of Borders' employees went out. Allen, who like Farrugia is a young soft spoken person, agreed with this assessment of their relationship.

In December 1996, subsequent to the Allen - Farrugia conversation, the Union filed a petition for representation. In January, four more union meetings were held with employees.

⁴ Katie Allen began work at the store as a bookseller in July 1995. She became Assistant Manager in March of 1996 and was demoted to bookseller in August 1997.

Three of these were held at the home of Farrugia and one was held at a local restaurant.

2. Respondent Addresses Operational Problems and the Union Campaign.

During the timeframe of the organizing campaign, Borders was also waging two campaigns of its own. The first was to cure operational problems within the Stamford store and the second was to persuade the employees that they did not need a union. Borders' Director of Employee Relations, James Lathrop, testified about both such campaigns. With respect to the operational problems, he testified that each Borders store is evaluated on operating performance. This evaluation is based on profit and sales primarily. Then each store is evaluated based on what Borders terms key statistics, which include inventory loss, customer service levels, how current a store is on returning old product, transaction levels, and the findings of visits by upper management to the stores. On these visits, called walkthroughs, upper management determines the physical condition of the stores and how well customers are being served. Specifically, they look at the condition of the store from a merchandising standpoint, asking themselves if it is well merchandised, is it creative, is it neat, are books shelved, is it being properly cleaned, is product being put up in a timely basis or is it backed up, are customers being served at the information desk and cash registers, are there lines, are telephones being answered, and is paperwork current.

Lathrop testified that from a performance standpoint, the Stamford store had been up and down over the years of its existence. He testified that in late 1996 into early 1997, it was struggling, but was now showing improvement. He learned of the problem as a result of a program in which the Company sends out a vice president to meet with employees in each store to solicit their feedback on what was happening in the stores. One such meeting took place in the Stamford store in the fall of 1996 and word got back to Lathrop that there were employee issues in the store. These issues included employee dissatisfaction with the Company over pay and the way they were being treated by management. Responding to these concerns, Lathrop visited the store and was struck by the store's poor condition. According to Lathrop, it was in disarray. Books were laying on the floor, book sections were not neat and shelved, the back room was backed-up with merchandise, phones were ringing off the hook and there were lines at the cash registers. In speaking with the store's Assistant Managers, he learned that there were teamwork problems among the management team, which centered on the then General Manager, Carol Wiener.

After his discussions with the Assistant Managers, he addressed the problems he saw with the General Manager and found Wiener did not know there was a problem and had no ideas on how to solve the problem. Lathrop determined that a change had to be made and a search was instituted within the region for a replacement for Wiener.⁵ Borders settled on Catherine Landau, who was working at its White Plains, New York store. She has very extensive experience in retail bookselling, having managed book stores for other companies, herself and with Borders. She accepted the position of General Manager of the Stamford store on January 2, 1997. When she began this assignment, she asked Lathrop what her involvement in the Union campaign would be. He instructed her that her responsibility was to get the store up to Borders' operational standards and to manage the store properly. She received the same direction from her Regional Manager. He informed her that corporate Human Resources would do whatever the Company deemed necessary with respect to the

⁵ As noted earlier, the Assistant Managers were also removed from their positions in 1997 because Lathrop and the successor General Manager Catherine Landau determined they were not capable of performing to Company standards in these positions.

Union campaign. Lathrop also had a team of trainers from other stores come in to help get the Stamford store back up to standards. These trainers physically reworked the store, rearranging shelving and displays, reshelving books and otherwise correcting the store's physical problems. Landau also instituted changes in procedures. She assigned more employees to cash register to cut down on customer lines. She began requiring employees to answer the phones. After being at the store for about two months, she decided the assistant managers were not satisfactory and changed them.⁶

Lathrop was also at the Stamford site in January 1997 to help convince the employees not to elect the Union as their representative. He held meetings with employees in which the Company's position was given. Other than the fact that meetings with employees were held, the record is silent as to any other actions the Company took to avoid unionization at the Stamford store. There are no Section 8(a)(1) violations alleged with respect to these efforts.

3. Events Occurring Post Election

On January 28, 1997, a Board conducted election was held at the Stamford store. Farrugia was the Union's only observer at this election. The Union lost the election and the Union then filed objections to the election. An initial hearing was held on these objections at the Board's offices in Hartford on February 28, 1997. At this hearing Farrugia testified on behalf of the Union. On the same date, Lathrop had posted in the break room at the Stamford store a memo to employees he wrote dated February 28. It reads:

"The saga continues...

Today, Vin, Catherine and myself spent the entire date at the Labor Board Hearing in Hartford.

As you know the Union is trying to convince the Labor Board to hold a new election.

Testifying on behalf of the Union was Samarpana Tam, Jon McNally and Christine Farrugia.

Late in the afternoon, I began my testimony. I did not finish and will continue my testimony on March 13, 1997 at 10:30 when the hearing is scheduled to resume.

We will keep you updated as we have further developments."

Lathrop testified that this memo was drafted as employees at the store were interested in what was happening with the Union campaign and this memo was to provide information about the ongoing events.

a. Christine Farrugia is Denied Contingency Status with Respondent.

⁶ Farrugia agreed that the store had problems and had had problems for some time. She was also aware that Carol Wiener was removed as general manager and demoted to a different position in another store. She was also aware that Christine Landau was subsequently made General Manager of the Stamford store to bring it up to acceptable standards. She acknowledged Landau was a harsher taskmaster than Wiener and created stricter rules than had existed before.

In mid-February, Farrugia went to Assistant Manager Todd Vasileff who was in charge of human resources for the Stamford store. She informed him that she had found another job and that her last date of employment with Borders' would be March 1.⁷ She asked that she be retained by Borders as a "contingent employee." or retained in "contingent" status. According to Farrugia, Vasileff told her that would be fine and that he would complete the paperwork for her.⁸ On March 2, she was given by Vasileff what is called an Employee Action Form, which indicates that she was a voluntary quit as of March 1. This did not seem right to her as she believed she had been changed to contingent employee status. She inexplicably did not call this to the attention of Vasileff, who she indicated was the person who told her that she could have that status. Instead she wrote a note to Aloisa saying "Chuck, I am still contingent, I am not leaving, Christine."

As of March 1, Borders had five employee classifications described in its employee handbook. The first classification is that of regular full-time employee, one with a minimum 35 hour work week. The second is regular part-time employee, one with a work week of at least 18 hours, but less than 35 hours a week. The third classification is that of regular contingent. This classification is describe as: "Average work week of less than 18 hours. Includes an employee kept on payroll on an on call basis. A contingent employee must work a minimum of eight (8) hours per calendar quarter to retain contingent status. A contingent employee may work a regular schedule of less than 18 hours." The fourth category is temporary employee, one hired on a temporary basis to help with fluctuating seasonal workload or a specific project. The last category is that of inactive, an employee who may be on some type extended leave and not currently working, but still a Borders' employee.

Lathrop testified that in 1997, there were changes made in these job classifications. First, a part-time employee has no minimum number of hours, the status just requiring a standard schedule. Contingent status is now an employee who is on call. Lathrop testified that a contingent employee is expected to have a flexible schedule and be able, on call, to cover for a vacation for a week, for a day or two for a sick regular employee, or for holiday work. The decision whether a particular store will have contingent employees and to what extent, if any, they are used is left to the discretion of the store's General Manager. Lathrop testified that the only downside to retaining employees in contingent status is they require paperwork to be generated as they are still on the payroll and other records, they receive employee discounts, and they take up space on Borders' computer system which it is outgrowing. He testified that another problem with contingent employees is that they do not work frequently enough to keep up with operational changes that are being made on an ongoing basis in the stores. Thus, some retraining might be required for a little as one day's work by a contingent employee. There are no current contingent employees at the Stamford store, a decision made by Landau. She testified that when she came in, Carrie Ullrich and Scott Brown were the two contingent

⁷ Farrugia had ceased being a full time employee in late January when she returned to school. At that time she dropped to part time status, asking to work only Saturdays and Sundays. This request was granted. In February she found another job and was not even able to work part time at Borders.

⁸ Since March 1997, Aloisa and Vasileff have resigned their employment with Borders. Allen has been demoted from Assistant Manager to bookseller. On the point of what Vasileff told Farrugia about contingent employee status, her affidavit given to the Board in April 1997 states that Vasileff said he was sorry she was leaving and that he would get everything ready for contingent status.

employees. When they voluntarily quit this status in the summer of 1997, she did not replace them. She testified that the needs of the store are being met without need for contingent employees. In 1997 Ullrich only work 15 hours, that in a two day period in February. Brown worked somewhat more.

5 Farrugia learned that her request for contingent employee status had not been granted in a meeting on March 28 with Aloisa about her annual evaluation. After discussing the matter of the evaluation, as noted in detail at a later point herein, Aloisa then changed the topic and told her that he did not want her to get mad at him as he was only the messenger, but that she
10 was being denied contingent employee status. He told her that granting contingent status was up to Landau and she had determined that they already had two persons on contingency status and they would work in the summer and Christmas and that Farrugia was not needed. Farrugia then left the meeting. Farrugia never discussed the matter of the denial of contingent status with Landau, though she could have.

15 Farrugia testified that she knew of one other employee, Alison Geldhart, who had been offered contingency status in February or March 1997. This belief is based on a conversation she overheard on March 1, when Vasileff asked Geldhart, who like Farrugia, was quitting that day, if she did not want to stay on as a contingency employee. The record is silent on whether
20 Geldhart took Vasileff up on this offer, but it does show that she did not become a contingent employee.

As of March 1997, Farrugia believed there were three existing contingent employees, Scott Brown, Carrie Ullrich and Lori Guiver-Howell. She is correct that Brown and Ullrich were in
25 this employee status. She is incorrect with respect to Guiver-Howell. Farrugia was aware that from September 1996 though March 1997, Ullrich had only worked twice, a few days each in September and a few in February. The same was true of Brown. She is aware that a contingency employee is purely at the call of the Company and must have a lot of flexibility. She based her belief that Guiver-Howell was contingent on having seen her work around Christmas
30 of 1996. No one from Borders had told her that this person was a contingent employee.

Landau explained why Farrugia was denied contingent employee status. She testified that Farrugia had worked full-time through the month of January, then asked for a part-time schedule, consisting of weekends for the month of February. At the end of February, Landau
35 was informed by an Assistant Manager that Farrugia could not meet this schedule and wanted contingent status. She responded that the store presently had two such employees which they were not using, so why add a third. She also noted that contingent employees have to be flexible as to time and Farrugia could not even work on weekends. She told the assistant manager, either Aloisa or Vasileff, to pass this message on to Farrugia.

40 Certain testimony was offered by Guiver-Howell and Ullrich with respect to the contingent employee issue. Guiver-Howell testified that she was first employed by the Borders' Stamford store in 1994 as a cashier, working her way up to Assistant Manager. She resigned her last position in March 1996. In November, 1996, she was visiting the store and speaking
45 with then General Manager Wiener, who related that the children's section was having problems. During her regular employment there, Guiver-Howell had been in charge of this department. Wiener asked if she wanted to come back and work once in a while. Guiver-Howell replied that she had another job and could not work a lot, but could work some. Wiener said they would like her back because of her knowledge. She then spoke with Vasileff and after telling him that her schedule was very full, he just said to come in anytime she could and work. Following these instructions, she came in about ten or twelve times in November and again in December. Once Christmas was past, the Assistant Managers indicated they could still use her

and she worked three or four times in January, a couple of times in February and once in March. She testified that she was never scheduled to work, but just showed up when she could and worked for as long as she wanted. Her work was primarily in the children's department, though occasionally she would be asked to work in another department. She testified that she was never called to work, just going when she could without management's prior knowledge that she was coming in. Guiver-Howell testified that she met the new General Manager Catherine Landau once when they were introduced by another employee while Guiver-Howell was working.

Landau testified that Guiver-Howell was a temporary employee hired for the Christmas season and worked a few days in the post Christmas period. Borders' personnel records reflect that indeed Guiver-Howell was hired on November 27, 1996 to work as a part-time temporary employee. Temporary employees are hired to cover additional staffing needs at holiday periods and primarily Christmas, the stores' business time. Landau was unaware that Guiver-Howell was setting her own schedule and noted it was something that she would not tolerate. She credibly and logically pointed out that such a system does not address the stores' staffing needs and could potentially cause a budget problem.

Carrie Ullrich testified that she was first employed by Borders in Stamford from September 1993 as part time employee in the children's department. Between that date until 1997, she worked at Borders in a number of capacities, including full time part time and contingent. She became a contingent employee in September 1996. She was a full time teacher and was asked to stay on at Borders as a contingent employee as she could not work more frequently due to her teaching schedule. She was told that management may call her for work, or she could call in and say she had hours she could work. These instructions were given her by the Assistant Managers. From September 1996 until February 1997, she worked as a contingency employee a handful of times, more than five, less than ten. Her schedules were set up by her calling and telling management she could work, or them calling her asking her to come in. As a teacher, she has certain vacation days, and three and four day weekends. Her last work as a contingency employee for Borders was in mid-February 1997.

According to Ullrich, her last work assignment came in January, when she came to the store to vote for the Union and she was asked to work in February. Ullrich testified that she was asked to work by General Manager Landau and Assistant Manager Allen. She met Landau after voting when Allen introduced her. Landau complimented her on her past work and asked if she could work in February. She also testified that when she first arrived to vote, Allen asked her how she was going to vote in the election. Ullrich testified that she felt intimidated and implied that she was going to vote against it. I do not believe this testimony. Allen credibly denied that she asked how Ullrich would vote and I credit that denial. Ullrich testified that after her vote, she was again asked by Allen how she voted, this time in the presence of Landau. Ullrich testified that she again hedged in her answer. Allen denied that this happened and again I credit Allen's denial.

Ullrich testified that she was again asked to work during the summer of 1997. This occurred when she went to the store in May to buy books. She testified that Allen and Vasileff discussed a possible schedule for the summer. She never called Borders back and they never called her. Company personnel records reflect that Ullrich was called to work in the summer and message left on her answering machine. When she did not return the call, she was removed from contingency status. I credit this documentation for the reason why Ullrich was removed as a contingent employee. Ullrich also testified that in December 1997, she was asked by an Assistant Manager named Tina to work during the Christmas season. Ullrich testified that she was in the store buying books and Tina, who was at the cash register, told her that anytime

she wanted to come back, let them know. Tina, actually Christina Kovacs, testified that she did have a conversation with Ullrich at Christmas 1997. She denied saying anything to Ullrich about again working for the store. I credit Tina's denial in this regard. I do not find Ullrich to be a credible witness and to the extent that her testimony is not supported by documentary evidence, I do not believe it. For reasons that are not clear to me, I believe Ullrich has found it necessary to make up testimony to support the case for Farrugia. Based on my observation of the witnesses involved and the documentation adduced, I find Landau, Kovacs and Allen to be very credible and Ullrich not to be.

b. Christine Farrugia Receives Her Annual Evaluation.

As noted, Farrugia's last day of employment with Borders was March 1. She picked up her last paycheck at Borders and noted she had been given a raise. She had been told that raises would be given based upon performance review. She went to Aloisa and asked for her performance review because she wanted to see what her raise was based upon. Aloisa told her that the performance reviews had not been done because they had run out of time. He added that he had just discussed the matter with General Manager Landau and they decided who would get raises so they could be granted on time. She said she wanted her evaluation in any event and he said he would have to call Landau who was away at the time.

Farrugia responded to this information by sending an E mail to Aloisa with a copy to Landau. This E mail reads:

"Chuck,

Apparently you left without giving me my review or telling me what Catherine said in your alleged conversation. The fact is that you both knew my last day was today. IT IS ON THE SCHEDULE! I should not have been given a raise WITHOUT my review, especially without being told. I will be in tomorrow night at which point I want my review (no excuses). I was told by Catherine that I would receive my review by February 28th. If Borders alleges that this is company-wide procedure, then they need to make it COMPANY-WIDE and not exclude our store. Again, I will be in Sunday night at which time I expect to receive my review."

On March 2, she indeed received her annual performance review from Vasileff. The review had been completed by Aloisa. Farrugia looked over the review and disagreed with the evaluation given her. The review is on a form used for the first time by Borders in 1997. Reviews are used as tools to improve employee performance, to reward excellent performance and to pave the way for elimination of employees who do not perform to acceptable standards. It is also used to determine the level of an annual raise, if any, given to employees. The 1997 form had five possible categories of overall ratings for employees geared to meeting expectations: 'far exceeds,' 'exceeds,' 'meets expectations,' 'needs improvement,' and 'unsatisfactory.' Lathrop testified that under this system, the Company expects the bulk of its employees to fall into the "meets expectations" category. He added that Borders' standards are high and that an employee meeting these standards is performing exceptionally well. It does not expect many employees to fall below its standards as it has a continuing development program to improve performance and a progressive disciplinary procedure to remove employees who do not improve. The purpose of the system is to reward employees who are really exceptional and to address the performance needs of those who do not meet standards.

The 1997 form is in a more empirical format, an attempt to bring some standardization to the evaluation program. The form used in 1996 was totally subjective. In 1997, upper management communicated to general managers the standards to be used in evaluations.

These standards are attendance and punctuality, good customer service skills and a willingness to help the customer, perfecting section maintenance skills to include restocking the shelves, keeping them in the appropriate order, shelving new product, pulling returns, and doing all that accurately. Also included are telephone skills, working the information desk, learning company systems and how to find and/or ordering books and operating the cash register. These are the basic standards for booksellers. There are no written and evidently no oral guidelines issued by Border's corporate offices to store General Managers to assign a numerical grade to performance. It evidently is left up to the General Managers to decide this, though based on Lathrop's testimony, it is clear that the Company expects most employees to fall into the number 3 rating, meets expectations.

Landau testified that she was at a Borders' management meeting out of state when she received a call from Aloisa stating that Farrugia want her evaluation and he wanted Landau to look it over and approve it. He faxed her a copy of what he had prepared. Landau was surprised that Farrugia would get an evaluation because she was quitting and the Company uses evaluations as a developmental tool, looking to the future development of the employee. In any event, she looked over the evaluation that Aloisa had prepared and based on her two months at the store believed it was accurate. She considered Farrugia to be good employee and had no complaints with her. As Landau considers Borders' standards to be high, she thought the rating fair. Landau was unaware of any previous evaluations given to Farrugia or any other documents either praising or criticizing her work.

Farrugia received the "meets expectations" overall rating and was granted a 4.5% salary increase, which was the general wage increase given employees by Borders in 1997. Those few employees exceeding expectations received a 5% wage increase. Evidence placed in the record by General Counsel indicates that only four of the some forty Stamford employees evaluated received the "exceeds expectations" rating.

The form also rates employees in two main sections in several categories and sub categories. The primary categories the first section are Customer Service, Section or Work Area Maintenance, Use of Systems and/or Tools to Get Work Done, Technical and/or Professional Knowledge or Skills, Professional Knowledge or Skills. In the second section, the skills of the employee assessed. In the first section, an employee receives ratings on fourteen categories of job performance. Farrugia was graded at "meets standards" in all but two of these categories. She received a "needs improvement" rating in the category asking whether the employee wears the Borders' name badge when working. This job requirement is a problem with many employees based on the record evidence. She received an "exceeds standard" under one category of use of systems.

Section III of the form gives a subjective summary of the employee's performance. Farrugia' summary reads: Christine's performance as a bookseller has been consistent. She has had no attendance or punctuality problems. Christine's work has been adequate in meeting the standards of customer service, merchandising, and register functions."

Farrugia left Aloisa a note on March 2, reading:

"Chuck, This review is wrong. I have consistently exceeded standards in this store in all of the noted areas (except for the badge thing). Perhaps you should look at the review that you wrote for me a couple of months ago. I think that it might refresh your memory. Please call me so that we can talk about this."

According to Farrugia, she was referring to a meeting she had with management in the

Fall of 1996 and a written performance recognition she was given in November, 1996. The meeting was held at some point in November a few days prior to November 20. Farrugia testified she was called to a meeting held by then General Manager Carol Wiener and Assistant Managers Aloisa and Vasileff and others in store management. She testified they told her that she had been doing a good job and they want to show their appreciation for her helping all of the managers. They also wanted to discuss the fact that she had told them she was returning to school in January and could no longer work because she was having to sell her car. The managers then offered to drive her to work. They also offered her the position of merchandising clerk, assisting the merchandising manager and also the responsibility of preparing displays.

Farrugia testified that on November 20, 1996, Aloisa told her that he was giving her what the Respondent refers to as a "Performance Discussion Record." This form is not an overall annual review, but, according to Respondent's witnesses, is a tool designed to spotlight at a point in time performance which needs noting, either because it is very good and needs recognition or is very bad and need correction. Farrugia received her discussion record on November 20, 1996 for "special recognition." She testified that when given the performance discussion, Aloisa told her that it was to be put into writing what she had been told in the earlier meeting. This performance discussion states:

"Christine's performance as a Border's employee has been nothing short of magnificent. She has shown time and time again that she can perform most any task that is asked of her. Over the last month, Christine has filled in as our trainer, maintained her assigned sections, and ordered & merchandised sidelines. In addition, she has taken on the task of merchandising the store's holiday stock. All of the duties listed above have been carried out by Christine in an above average manner. Christine is the mold of outstanding Border's employee."

Landau first saw this document well after Farrugia's 1997 annual evaluation had been given Farrugia. Landau testified that performance discussions are like a snapshot, recording performance at a particular point in time and does not constitute an evaluation of a total year's performance. It is clear from the testimony adduced that Farrugia believes that, among other reasons, she deserved the exceeds expectations rating because of all the extra duties and corresponding titles she had been given by Carol Wiener in the fall of 1996. According to Lathrop, having more than normal responsibilities does not by itself exceed Borders' expectations, it is how well the employee handles those responsibilities. It was not shown that Landau had any knowledge that Farrugia had special titles or responsibilities. I find it very doubtful she did as she credibly testified that she does not bestow the type titles given Farrugia's job by Wiener.

Farrugia's previous annual performance rating given in March 1996 is not quite so complimentary as the November 20 Performance Discussion. It was given on a form that rates employees in number of categories, but subjectively and not by a rating of exceeds expectations, meets expectations or needs improvement. As it is subjective and not subject to a numerical or categorical rating, it is difficult to compare it to her 1997 annual review. Clearly, the 1996 review is a good review, though it notes that she needs to improve in shelving speed and expression of ideas. It congratulates her on her display skills. It appears to me to be comparable to her 1997 review, which was also good. Both noted an area in which she was exceptional and both had an area in which improvement was sought. The record is silent with regard to the question of whether she received an above average wage increase in 1996 or the wage increase given to most employees.

In response to Farrugia's note complaining about her evaluation, Aloisa called her residence about a week later, but she was not home. They met to discuss the review on March

28, 1997 in the General Manager's office. At this meeting, Farrugia noted that the 1997 review was not as good as the November performance discussion. According to Farrugia, Aloisa told her that it was not a bad review and that no one got a higher rating, though a lot of employees got the same rating as she.⁹ Farrugia argued with him, pointing out certain areas in which her performance was superior to other lead clerks. Aloisa continue to tell her that she had not received a bad review, noting that the review was not based solely on his own observations, but those of the other assistant managers as well. She asked what the other managers had said about her and Aloisa said he could not remember. At this point, Farrugia asked what she could do about the review and Aloisa told her she could speak with General Manager Landau. Farrugia asked what that would accomplish as Landau had only been at the store for a few weeks and was not really familiar with her performance. She asked if Aloisa would speak on her behalf and he said he did not know. She then asked what it would take to get an exceeds standards rating and he again said he did not know. Farrugia never spoke with Landau about the evaluation.

C. Conclusions with respect to the Alleged Unfair Labor Practices

1. Did Respondent Unlawfully Interrogate Christine Farrugia and Give the Impression of Surveillance of its Employees' Union Activities?

This Complaint allegation involves the interrogation of Farrugia by Allen in December, 1996, before the petition for representation was filed. As noted earlier, Farrugia and Allen both considered themselves friends. Allen admitted that the interrogation took place, testifying credibly that it was prompted by an employee asking Allen what was going on, noting that Farrugia had been soliciting signatures for union cards. Allen, again credibly I believe, was simply curious and asked Farrugia what was going on with the union. Farrugia, without showing any fear or signs of intimidation gave Allen a straight answer, to which Allen replied fine, go ahead and do it. There is no showing that thereafter, the matter was ever mentioned again. Absolutely no threats or hints of threats were directed toward Farrugia or any other employee believed or known to be a Union supporter.

Generally the Board evaluates interrogations of employees as to their union activity in light of all the surrounding circumstances, including the time, place, personnel involved, and known position of the employer. Where interrogations are sufficiently isolated and occur in an atmosphere free of coercive conduct, such interrogations are not unlawful. Here an isolated interrogation, before any knowledge of union activity was known by management, took place between two friends in an atmosphere entirely free of coercive conduct and without any hint of threat being made. I do not find the interrogation unlawful.

With respect to the matter of surveillance, Allen told Farrugia the reason she was asking the question was because another employee, whom she named, had asked her that question. I do not believe that the impression of surveillance is given when, as here, the interrogation is innocuous and the reason why the employee is being interrogated is given as well as the source.

I will recommend that the Complaint allegations regarding this interrogation be dismissed.

⁹ As noted earlier, this is not quite accurate as at least four employees did receive a higher rating than Farrugia.

2. Did Respondent Unlawfully Discriminate Against Christine Farrugia?

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Under the test announced in *Wright Lines, a Division of Wright Line, Inc.*, adverse action by an employer against an employee is violative of the Act only if the employee’s protected conduct is a substantial or motivating factor for the employer’s action. If the General Counsel carries the burden of proving unlawful motivation, then the employer may avoid being held in violation of the Act only if it can show that the same action would have been taken in the absence of the protected conduct. In establishing a *prima facie* case of unlawful motivation as the first part of the *Wright Line* test, the General Counsel is required to prove not only that the employer knew of the employee’s union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was anti-union animus to “link the factors of timing and knowledge to the improper motivation. *Service Employees Local 434-B*, 316 NLRB 1059 (1995). Additionally, an employer who discharges or discriminates against an employee because that employee testifies adversely to the employer’s position at a Board hearing violates Section 8(a)(4) of the Act. *McVean Steel*, 230 NLRB 793 (1977).

In the case of Christine Farrugia, finding protected activity and knowledge of that activity by Borders is simple. She was the driving force behind the organizing campaign, was the Union’s observer at the election and gave testimony on behalf of the Union at the objections hearing, all before the alleged discrimination occurred. Respondent’s management attended both the election and the objections hearing and observed Farrugia engaging in Union activity at those events. Katie Allen knew of Farrugia’s role in the organizing campaign from the outset and based on how she learned of it, it would have been common knowledge as Farrugia made no attempt to hide her organizing efforts.

However, two much more difficult questions remain. Was there anti-union animus demonstrated in this record, and even more difficult, was there any actual discrimination shown toward Farrugia by Respondent. Respondent’s officials testifying in this proceeding admitted that Borders does not want a union representing its employees at any of its stores. It admitted having meetings with Stamford employees to communicate that message. Indeed, Borders’ feelings on the subject are set forth in writing in its employee handbook in force at the time of the alleged discrimination. Under the *Management Philosophy Statement* section of the handbook is the following:

“Borders is committed to maintaining an employee relations climate which promotes maximum personal development and achievement. We are dedicated to treating our employees fairly and providing good working conditions, competitive wages and benefits, and above all, the respect which each employee deserves. We also believe in open and direct communication which permits the resolution of employee problems in an atmosphere of mutual trust, responsive to individual circumstances. the company shall continue its efforts to enhance these objectives.

We do not believe our employees would benefit from outside intervention into this relationship, but firmly believe that the best interests of our employees can be served without third-part[y] interference, particularly a union. We greatly value our ability to work with employees individually without their being subjected to burdensome union costs, complicated rules, and costly work stoppages.

We will vigorously strive to preserve an environment which nurtures the fulfillment of

these goals.”

The fact that Borders does not want a union in its stores is about the sum and substance of the proof of anti-union animus shown in this record.¹⁰ Aside from the relatively innocuous and in my opinion lawful, inquiry by Allen of Farrugia of what was going on, and the alleged discrimination against Farrugia being discussed, there are no independent Section 8(a)(1) allegations alleged in the Complaint. This very weak showing of animus, when considered with the substantial question of whether any actual discrimination took place leads me to believe that a *prima facie* showing under a *Wright Line* analysis has not been made. In neither the matter of the evaluation nor the denial of contingent employee status can timing be said to support a finding of unlawful motivation. The timing of the evaluation was fixed by the past practice of Respondent in giving evaluations in February of each year. The timing of the denial of contingent employee status was occasioned by Farrugia’s voluntary choice to quit regular employment as of March 1.

The matter of calling the evaluation given Farrugia discrimination is somewhat perplexing to me. First, Farrugia had already quit and was off the payroll of Borders when she demanded that she get an evaluation. As credibly testified by Landau and Lathrop, the evaluation is meant to be a developmental tool with future application. It could have no future application to an employee who has quit. Second, the evaluation was a good one and I can find nothing in the evaluation which would in any way negatively bear on Farrugia’s ability to come back to employment with Borders in the future or negatively impact her ability to use Borders as a reference for employment for others, assuming, which I doubt, that Borders would make the evaluation public. Assuming, *arguendo*, that Farrugia had chosen to stay with Borders, the evaluation would not have hurt her in any way, except that she would have been denied a possible one half percent wage increase reserved for exceptional employees. As noted only four of some forty employees got a better rating than Farrugia. Further, Farrugia was invited to discuss the evaluation with Landau, but declined to do so.

Granting that the 1997 evaluation is not as glowing as the performance discussion given Farrugia in November 1996, prior to her Union activities, it is not much different than the previous good annual evaluation given her in February 1996, also at a time prior to her Union involvement. Moreover, the 1997 evaluation was given not only at the end of the Union campaign, it was given in the midst of a serious effort by Borders to correct unquestioned performance and operational problems with the store. The prior General Manager who had directed the November performance discussion be given to Farrugia had been demoted and transferred and a much tougher manager had been put in place. It is not unlikely that a closer look would be taken at what constitutes exceptional performance.

The matter of the denial of contingent employee status constituting unlawful discrimination is also very questionable. The granting of this status is solely at the discretion of the General Manager of a Borders’ store. Regardless of what Assistant Manager Aloisa told Farrugia, he did not have any say in whether she would get the contingent status. He did pass the request on to General Manager Landau. She denied it on the logical grounds that the Stamford store was making virtually no use of its two existing contingent employees. Her further reasoning that Farrugia did not seem a likely candidate for such status is also supported by the record evidence. A contingent employee is one on call, to fill in for sick or otherwise absent

¹⁰ General Counsel also asserts that the memo prepared by Lathrop on February 28 outlining what happened at the first objections hearing indicates animus. I do not find this assertion has merit.

employees, to cover vacations and for spot seasonal work. Accordingly, such an employee must have a very flexible schedule. Both existing contingent employees, Brown and Ullrich were school teachers, with regular weekends free, some three and four day weekends free, seasonal holidays free and summers free. Farrugia had demonstrated to Landau that she could not even work a weekend schedule in February, was not only working another presumably regular full time or part-time job, but was also going to school. This lack of flexibility makes Farrugia in my opinion a highly unlikely candidate for contingent employee status.

Landau was a very credible witness and I credit her reasons for denying this status to Farrugia. Her statements are borne out by the fact that she added no one to the contingent employee status subsequent to the denial of that status to Farrugia and has, in fact, dropped all contingent employees.

Based on the weak showing of animus and my belief that no discrimination has been shown for the reasons set forth above, I do not find that General Counsel has made the requisite *prima facie* showing under *Wright Line*. In the event that such a showing is subsequently found to have been made, I would find that Respondent has met its burden of showing it would have taken the same action even in the absence of protected activity for the reasons set forth above. I will recommend that the Complaint allegations with respect to unlawful discrimination under Section 8(a)(3) and (4) be dismissed.

Conclusions of Law

1. The Respondent, Borders, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not commit the unfair labor practices alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Wallace H. Nations
Administrative Law Judge

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.